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MEMORANDUM

TO: Senate Committee on Judiciary, Utilities, Commerce, and Government Operations

FROM: Douglas Parrott, Legislative Associate

DATE: October 4, 2011

RE: Support for Senate Bill 125

The Wisconsin Counties Association (WCA) strongly supports Senate Bill 125 (SB 125). SB 125 repeals language in the Wisconsin Statutes that relate to the liability of municipalities and counties for insufficient or inadequately maintained highways. Under current law, local governments have a greater liability than the State. The Supreme Court has called for legislation to remedy this situation and SB 125 does just that by ensuring the burden faced by local governments is no greater than that faced by the State.

Section 893.80 (4) Wis. Stats. confers immunity for cities, towns, and counties from the performance of a discretionary duty, or duty which requires a governmental entity to use judgment or discretion in carrying out this duty.

The Wisconsin Supreme Court in *Morris v. Juneau County* held that the statutory provision imposing liability on cities, villages, towns, and counties for highway defects (formerly s. 81.15 and s. 81.17, now s. 893.83) is an exception from liability arising out of the performance of discretionary duties. However, in the *Morrison* decision the Supreme Court clearly states that is has repeatedly suggested that the legislature repeal s. 81.15 and s. 81.17, now s. 893.83. The Court states, "Because the Legislature continued to breathe life into a statute which the court stated was no longer needed, we must now give the statute effect."

Potholes and similar road wear can develop with little warning, as weather conditions in Wisconsin are unpredictable and road conditions can literally change in the blink of an eye. A highway could experience a pavement blowout and five minutes later the newly formed pothole could damage a car. A county could be held liable for a situation it was not even aware of.

SB 125 would not relieve counties of their responsibility to perform highway repairs, timely or otherwise. The bill will not allow local governments to be negligent in their ministerial duties without liability, as s. 893.80 would not be eliminated. SB 125 simply holds local governments to the same standard as the State.

County highway departments have the very difficult task of maintaining safe roads for a minimal amount of taxpayer dollars. SB 125 will ensure that those dollars go to repairing and maintaining roads rather than costly lawsuits. For these reasons, WCA respectfully requests your positive action on Senate Bill 125.

Thank you for considering our comments. If you have any questions please do not hesitate to contact me at the WCA office at 608.663.7188.

ATTORNEY-CLIENT PRIVILEGED

MEMORANDUM

TO: Mark O'Connell, Executive Director
Douglas Parrott, Legislative Associate
Wisconsin Counties Association

FROM: Andrew T. Phillips, Jessica Solberg
Phillips Borowski, S.C.

RE: Assembly Bill 180

DATE: September 9, 2011

You have asked for our analysis of Assembly Bill 180 (AB 180). Specifically, you have questioned whether AB 180, relating to a municipality's liability for damages caused by highway defects, modifies existing rules relating to comparative negligence and, as well, whether the bill would impact the immunity provisions contained within Wis. Stat. § 893.80. Our analysis follows.

BACKGROUND

Assembly Bill 180 repeals language in Wis. Stat. § 893.83 which relates to a municipality's liability for insufficient or inadequately maintained highways. The language sought to be repealed from this statute makes cities, villages, towns, and counties strictly liable for damages of up to $50,000 to a person or property resulting from insufficient highways. In other words, under current law, a county may be held liable for damages without regard to a county's purported negligence, or lack thereof, in constructing a safe highway and in fixing defects caused by the county after original construction of the highway. *Cable v. Marinette County*, 17 Wis. 2d 590, 117 N.W.2d 605 (1962); *Hales v. City of Wauwatosa*, 275 Wis. 445, 82 N.W.2d 301 (1957). Plaintiffs are only required to prove the county's negligence in cases involving an alleged failure to repair highways for defects caused by the elements or acts of third persons. *Morley v. City of Reedsburg*, 211 Wis. 504, 248 N.W. 431 (1933). AB 180 also eliminates the automatic secondary liability of cities, villages, towns, and counties. Under current § 893.83(2), local governments may be sued even when another person or private corporation is primarily liable. If a person or private corporation is found primarily liable yet is unable to satisfy a judgment, the county is liable for the unpaid balance if the county is shown to be secondarily liable because the damages were caused, at least in part, by reason of a highway defect.

ANALYSIS

The Legislature first enacted Wis. Stat. § 893.83 (formerly numbered §§ 81.15 and 81.17) in 1849 as a legislative exception to the common law rule of unlimited governmental immunity. In 1962, the Supreme Court abrogated the common law rule of absolute governmental immunity in *Holytz v. Milaukee,* 17 Wi. 2d 26 (1962). In response to the Court's decision in *Holytz,* the legislature created the immunity statute Wis. Stat. § 331.43 (1963) (currently § 893.80.) Section 893.80 codifies the *Holytz* holding providing immunity to cities, villages, towns, and counties for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

For the past forty plus years, the Wisconsin Supreme Court has repeatedly urged the Legislature to repeal the statute creating automatic municipal liability for highway defects because the exception to immunity that it creates is unnecessary in light of the existing rules relating to immunity. In *Morris v. Juneau County,* 219 Wis. 2d 544 (1998), the Supreme Court held that the statutory provision (then Wis. Stat. § 81.15) imposing liability on cities, villages, towns, and counties for highway defects is an exception from liability arising out of the performance of quasi-legislative, *i.e.,* discretionary, duties. However, the Court repeated that "[a] lot of confusion in the practice would be avoided if the legislature would repeal [§ 893.83], which is no longer needed since our decision in *Holytz.*" *Id.* at 554. The Court held that "[b]ecause the Legislature continued to breathe life into a statute which the Court stated was no longer needed, we must now give the statute effect." *Id.* at 556-557.

The Supreme Court has noted that even in the absence of § 893.83, liability for highway defects still exists because of the abrogation of the common law governmental immunity set forth in *Holytz.* AB 180 does not eliminate or otherwise limit Wis. Stat. § 893.80. Therefore, AB 180 would not allow local governments to be negligent in their ministerial (*i.e.,* not quasi-legislative) duties relating to the maintenance and repair of highways without the prospect of being held liable for the negligence.

Section 893.80 is a general statute that relates to claims against government bodies or officers. The statute recognizes that local governments are immune from suit when they are exercising their discretion in terms of the manner in which they carry out their governmental functions. The law provides that if there is no clear duty on the part of a local government to repair a local highway, the local government may not be held accountable for exercising its discretion. Section 893.83, on the other hand, creates strict liability for local governments and essentially cripples local governments' ability to use discretion in dealing with budgetary and timing issues involved with highway maintenance, especially given Wisconsin's erratic climate.

Additional support for the public policy rationale behind AB 180 is found in the statutes relating to the state's liability for highway defects. AB 180, if signed into law, will afford local government the same level of protection from liability that the state currently enjoys. Under current law, plaintiffs may recover as much as $50,000 in damages from a county without having to prove that the county was actually negligent. By contrast, when suing state officers, employees or agents for damages resulting from state highway defects, plaintiffs must prove that state government agents were negligent. Wis. Stat. § 893.82.

CONCLUSION

AB 180 simply reinforces the well-settled principle that local governments are immune from suit when acting in a quasi-legislative capacity and follows the Supreme Court's recommendation to address the relationship between the two aforementioned statutes. In essence, AB 180 simply holds counties to the same rules of negligence as exist with all other forms of liability.

If you have any questions concerning our analysis of AB 180, please do not hesitate to contact us. As always, we appreciate the opportunity to be of service to the Wisconsin Counties Association and its member counties.

WISCONSIN ASSOCIATION *for* JUSTICE

formerly the Wisconsin Academy of Trial Lawyers

Testimony of
Ann S. Jacobs
on behalf of the
Wisconsin Association for Justice
before the
Committee on Judiciary, Utilities, Commerce, and Government Operations

Sen. Rich Zipperer, Chair
on
2011 Senate Bill 125
October 4, 2011

CHAIRMAN ZIPPERER AND MEMBERS OF THE COMMITTEE, my name is Ann Jacobs. I am a shareholder of Domnitz & Skemp, S.C. in Milwaukee, Wisconsin. I am representing the Wisconsin Association for Justice (WAJ) in opposing SB-125. Thank you for this opportunity to testify in opposition to SB-125.

Wisconsin has had a long tradition of pride in the maintenance of its roads. Since 1849, Wisconsin law has required our counties, cities, villages and towns to fix bridges, highways, sidewalks, parking lots and shoulders of roads to keep them safe for all users. When a municipality has knowledge of a road in disrepair, it must repair it, or it may be liable for the harm caused to its citizens. The legislative policy to protect travelers and users of highways and bridges was recognized in some of the earliest decisions of the Wisconsin Supreme Court going back to 1867.

Our current statute is employed when a citizen who has suffered an injury in a motor vehicle crash can prove that a cause of the crash was a failure on the part of a municipality to repair a known defect on a highway. At the time the original law was adopted in the mid-1800's, it was one of the few areas where liability was imposed on government.

SB-125 changes Wisconsin law to eliminate the responsibility of municipalities for the harm they cause, and sadly, abandons Wisconsin's commitment to the safety of its citizens.

Why This Issue Is Important

The implications of this change are important. While the bulk of incidents resulting from a road or bridge in disrepair may be minor, the public harm that can occur when municipal infrastructure is not repaired can be devastating. In Minnesota, just four years ago, the I-35W bridge in Minneapolis collapsed, killing thirteen people and injuring 121 others. The 40-year old bridge collapsed into the river and its banks without warning. I think we have all seen the photos.

The I-35W bridge had been inspected yearly since 1993, and in the year before it fell (2006), part of the bridge had been rated poor. Despite these concerns, it was rated safe for legal truck loads and permitted overweight truck loads of up to 136,000 lbs. The bridge was not under any restrictions despite its poor rating, and each day over 144,000 vehicles crossed this bridge. Indeed, at the time of the collapse, there were approximately 120 vehicles, carrying 160 people, on the bridge.

What does this object lesson tell us about the bridges in Wisconsin that are structurally deficient or functionally obsolete?

In 2010, 1,861 bridges in Wisconsin were deemed structurally deficient or functionally obsolete by the U.S. DOT. That means they were either closed, restricted to lighter vehicles, or have speed or weight limits.[1] These bridges give an example of the risk posed to our innocent citizens when we fail to maintain our infrastructure.

The Current Law Works In Wisconsin – Balancing The Needs of Citizens and Municipalities

As a preliminary matter, there is already a cap of $50,000 in Wisconsin law for damages arising from road and highway defects. Most municipalities carry far greater insurance coverage. Indeed, fiscal estimates by the state departments of Transportation and Revenue say savings to local governments are indeterminate – likely due to this low limitation in the first instance.

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[1] http://www.fhwa.dot.gov/bridge/nbi/defbr10.cfm. A **structurally deficient** bridge is closed or restricted to lighter vehicles because of at least one deteriorating structural component. While not necessarily unsafe, these bridges may have limits for speed and weight. A **functionally obsolete** bridge has older design features, and while it is not unsafe for all vehicles, it may not adequately accommodate current traffic volumes, and vehicle sizes and weights.

There also appears to be some misunderstanding on how negligence cases proceed in Wisconsin. I have attached a flow chart of how negligence cases proceed under current law and where Wis. Stat. §893.83 fits into this analysis.

Remarkably, SB-125 essentially eliminates a general duty of local governments to maintain highways and bridges. It would render them generally not liable to pay for damages resulting from their failure to maintain them. Unless the injured person could prove the local government had a duty to act under another statutory provision, local governments would enjoy immunity from accidents involving failure to safely maintain highways or bridges.

Under the bill, if the repair of roads is found to be a discretionary act, the average citizens will be unable to hold local governments responsible for failing to reasonably repair and maintain our bridges and highways. Even the current minimal ability to collect small damages is wiped out.

Realistically, insurance rates will not drop for local governments if they are allowed to shirk responsibility for fixing sidewalks, bridges and roads. Considering the very few lawsuits filed and won annually against municipalities, the idea that new money will be available to pay for local road repairs is unrealistic and misses the point. We do not permit one citizen to be injured due to a poorly maintained road so that another may have a new road.

False Claims & Misunderstandings

There have also been false claims by supporters of this bill that without this bill local governments can be sued without notice of the defect. The example given was that a part of a highway buckles due to very hot weather and a motorist drives over it 5 minutes later. That is simply not correct. Actual or constructive notice is already required by existing law. Constructive notice can only occur after a length of time before the injury occurs, so that the local government, in the exercise of ordinary care should have discovered it in time to fix the problem.

This bill is a reaction to the Supreme Court decision from Juneau County (*Morris v. Juneau County*, 219 Wis. 2d 544 (1998). Contrary to various claims, this decision did not change the law in any significant way. Indeed, DOT Counsel in a 1999 memo stated explicitly that this decision has "no significant effect " on county exposure to liability.[2] Highway maintenance has always been a nondiscretionary duty– it is not something a municipality could opt out of.

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[2] Law Note, January 15, 1999 by Jim Theil, Office of General Counsel, Department of Transportation.

Supporters of the legislation have wrongly predicted a flood of litigation because of the Juneau County case as one of the primary reasons given for the need to repeal the statute. We have had 12 years to assess the impact of that case. Frankly, there has never been much litigation under this statute throughout our history, and it has not risen in the years since the Supreme Court decision. That is because these lawsuits are difficult to prove, expensive to bring (because they require expert engineering testimony as to the defect), and limited in recovery because the maximum recovery is $50,000. Passing this bill will not change that.

We urge you to consider the needs of all Wisconsinites for safety on their roads and for redress in the unfortunate circumstances when they have been injured because those roads are defective or haven't been maintained. We believe that local governments should have a duty to maintain safe roadways and bridges. Your constituents expect their local governments to repair known defects in highways that lead to unsafe conditions. Passing this bill will not change the public's expectation.

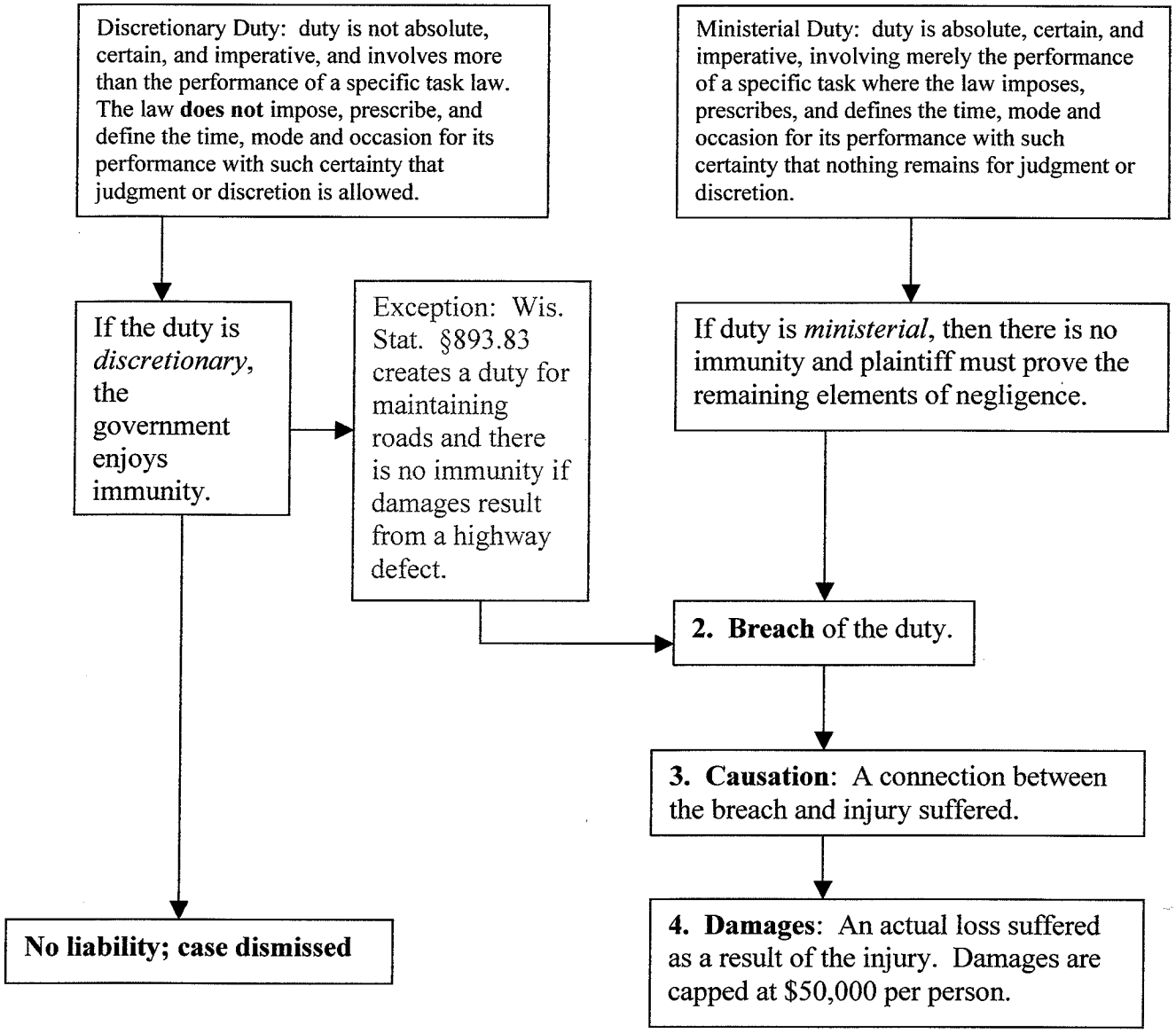
We urge you to oppose SB-125, and honor Wisconsin's long-standing tradition of protecting the safety of its citizens.

Thank you.

Local Government Negligence Case – Flow Chart

In negligence cases against a local government, here is how a case proceeds:

1. **Duty**: the **duty** question is broken down to determining whether the duty was *discretionary* or *ministerial* under Wis. Stat. § 893.80.



SB-125 means local governments would not have a general duty to maintain highways and bridges and they would generally not be liable to pay for damages involving highway or bridge defects. Unless the injured person could prove the local government had a duty to act under another statutory provision, local governments would enjoy immunity from accidents involving highway or bridge defects.

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To: Senate Committee on Judiciary, Utilities, Commerce, and Government Operations

From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities

Date: October 4, 2011

Re: Support for SB 125, the Pothole Liability Bill

The League of Wisconsin Municipalities supports Senate Bill 125, which provides municipality's with the ability to assert a defense of immunity from liability for discretionary highway maintenance decisions.

A similar bill passed both houses in the 2005-06 session, but was vetoed by Governor Doyle at the request of the Wisconsin Academy of Trial Lawyers.

Municipal officials support SB 125 for the following reasons:

- By eliminating the pothole liability exception in sec. 893.83, Stats., the bill treats discretionary highway maintenance decisions by municipal officials the same as other discretionary actions by municipalities – they are immune from liability.
- It makes the rule of immunity for discretionary municipal functions consistent and uniform.
- It retains the three-week grace period provided to municipalities for snow and ice removal that has been in existence since 1898.
- These changes may reduce or stabilize local government liability insurance premiums.

For these reasons we urge you to recommend passage of SB 125. Thanks for considering our comments on this important bill.